IN THE

Supreme Court of the United States

No. 722 October Term,

CARL McINTIRE; YOUNG PEOPLE'S CHURCH OF THE AIR, INC., a corporation; WORD OF LIFE FELLOWSHIP, INC., a corporation; THEODORE ELSNER, E. SCHUYLER ENGLISH, HIGHWAY MISSION TABERNACLE, a corporation; WILEY MISSION, INC., a corporation; and WESLEYAN METHODIST CHURCH, a corporation,

vs.

WM. PENN BROADCASTING COMPANY OF PHILADELPHIA, owners and operators of Radio Broadcasting Station "WPEN".

PETITION OF CARL McINTIRE, THEODORE ELSNER, and WILEY MISSION, INC., a corporation, FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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CASES CITED.

ACTS CITED

IN THE
SUPREME COURT OF THE UNITED STATES.

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners Carl McIntire; Theodore Elsner; and Wiley Mission, Inc., a corporation, respectfully pray that

a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Third Circuit handed down on October 12, 1945.

JURISDICTION.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

OPINIONS BELOW.

The District Court for the Eastern District of Pennsylvania filed no opinion. The opinion of the Circuit Court of Appeals ~~(R. 133-137)~~ is reported in 151 F. 2d 597.

QUESTIONS PRESENTED.

1. Is a radio broadcasting station a facility employed in rendering quasi-public service such as water works, gas works, railroads, telephones and telegraphs are, and therefore a public utility?

2. Does Congress under its constitutional power over interstate commerce have the power to extend existing legislation relating to radio broadcasting stations to the point of fixing and regulating the rates to be charged by a radio station as a public utility and in other respects which may be required by public interest, necessity or convenience.

3. Assuming that Congress under its constitutional power over interstate commerce has the power to extend existing legislation relating to radio broadcasting stations to the point of fixing and regulating the rates to be charged by a radio station as a public utility and making other changes if any required by public interest, necessity or convenience, but has not as yet fully exercised such regulatory powers, does this affect in any way the question whether a radio station is a public utility and, as such under the responsibilities and limitations to which public utilites as such are subject under the Constitution, statutes or by common law.

4. As the Federal Communications Act provides that the field of broadcasting is one of free competition (*Federal Communications Commission v. Sanders Bros.*, 309 U. S. 470, 474), does a radio broadcasting station possess the right to bar in advance and for all time any person, firm or corporation of proper character and qualifications from applying for an assignment of time on its station, for a recognized and legitimate purpose to be used in compliance with the rules of the broadcasting station applicable to all advertisers and at the rates required of all advertisers.

5. Does the right of any person, firm or corporation to apply for time on the spectrum of a radio broadcasting station for a radio broadcast to be conducted in accordance with the rules of the station applicable to all advertisers or sponsors, and at the rates paid by other advertisers and sponsors, constitute a property right.

6. The Federal Communications Act (Title 47 U.S.C. Sec. 151) provides:

> "for the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible to all the people of the United States a rapid, efficient, Nation-wide, and

> world-wide wire and radio communication service with adequate facilities at *reasonable charges* (emphasis supplied), * * * there is hereby created a commission to be known as the 'Federal Communications Commission', which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter."

May a broadcasting station, where the choice between applications lies between two equally qualified and competent applicants desiring to occupy the same time on the spectrum for legitimate purposes, reject the application of the aplicant who offers to pay the usual charge of the station and make a gift of that time to the applicant who does not propose to, and does not, pay the usual charge therefor.

7. Including, without restating, the facts, both express and implied set out in the preceding question, does the fact that the applicant, ready and willing to pay the usual charges of the station, has been an advertiser on the station for a number of years paying for the service at the usual rates, give him, under the doctrine of equitable estoppel, and as against an applicant who asks for the same time as a gift any additional rights, and if so what.

8. Without restating the facts stated both express and implied in the two preceding questions, does the fact that the applicant, ready and willing to pay the usual charges of the station; plans to continue broadcasts of religious services and that the station was founded principally for and has since been largely maintained by paid broadcasts of religious services give to such applicant, ready and willing to pay the usual charges of the station, any additional rights under the doctrine of equitable estoppel as against an applicant who plans to receive the same time for the same purpose but without payment and as a gift.

9. If a radio station makes the choice set out in the preceding question as between two persons each desiring to make a religious broadcast and expressly bars the applicant who offers to pay the station's charges and bars such person solely for the reason that he offers to pay such charges, to what extent is that a violation of the free exercise of religion secured by the Constitution.

10. If a radio broadcasting station commits the acts, or some of them, described in questions 4, 6 and 8, are such acts, or any of them so committed, illegal because in violation of the anti-trust laws or of the common law.

11. Having in mind the provisions of Sec. 313 of the Communications Act of 1934 (47 U.S.C. 313) reading in part as follows:

> "Sec. 313. All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications."

and the provisions of Sec. 414 of the same act:

> "Sec. 414. Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

does the amended bill of complaint herein set out contain any cause of action in favor of the plaintiffs, or any of them, against the defendant.

12. Ought a bill in equity praying for injunction and other relief be dismissed on defendant's motion, without denials

or a hearing on the merits where the bill sets out as facts that the defendant in violation of the right of free speech and free exercise of religion, maliciously and in order to discriminate intentionally against the plaintiffs in particular and against the broadcast of religious services in general, except those of its own choosing, cancelled and refused to renew plaintiffs' contracts for paid time to broadcast religious services, resulting as defendant knew it would in excluding plaintiffs from the air; refused to permit plaintiffs to bid for available paid time at its usual rates in competition with others; and in lieu thereof established a policy of giving the equivalent of plaintiffs' paid time to others free for the broadcasting of religious services, all to the irreparable damage of the plaintiffs.

13. The opinion below states:

> "The authority of the Commission as defined in Section 303, 47 U.S.C.A. Sec. 303, includes the power to pass upon such allegations of unfair treatment as the plaintiffs make here respecting the defendant. The Commission may refuse to renew the defendant's license if it has failed to act in the public interest."

There is no express provision in Section 303 of the Federal Communications Act authorizing the Federal Communications Commission to do anything except to express an opinion as to allegations of unfair treatment such as the plaintiffs make in the case at bar respecting the defendant. Is the fact that "the Commission may refuse to renew defendant's license if it has failed to act in the public interest" a bar to the maintenance by a plaintiff of a proper suit based on facts duly alleged which constitute violations of the Constitution or a statute or statutes or the common law.

14. Does the fact that the Commission may refuse to renew defendant's license if it has failed to act in the public interest confer any power whatever to protect any right of

a plaintiff, which right has been invaded by an act or acts of the defendant.

15. In the opinion below it is stated:

> "In any event the enforcement of the act rests in the F.C.C. and not in the District Courts of the United States save for a right of review of the Commission's orders afforded under Section 402(a)".

Is it a fact that the courts possess no power in relation to the enforcement of the Federal Communications Act other than that stated in the language quoted.

16. The opinion states:

> "The First Amendment was intended to operate as a limitation to the actions of Congress and of the federal government."

Is it a fact that where a radio broadcaster commits an act which excludes all applicants for religious broadcasts who desire time on that station to be paid for at the station's usual rates and permits the station to confine religious broadcasts to those whom it picks out to receive as a gift, free time for religious broadcasts over its station, and a District Court upholds this action and thus puts an interpretation on that portion of the Federal Communications Act which makes it an unconstitutional interference with the free exercise of religion, that this act on the part of the District Court, or of the Circuit Court if it affirms the judgment of the District Court, can not be reviewed either in the Circuit Court, or in this Court, as the case may be.

17. As the choice of programs rests, at least in the first instance, solely with the broadcasting station, licensee of the Federal Communications Commission, and censorship by the Federal Communications Commission is prohibited by Sec. 326 of the Act (47 U.S.C.), if the right of an applicant to apply for time on the program of the licensee

station is a property right, is not a suit in equity by the applicant in the case of a refusal of his right even to make application for a license, necessary and proper procedure, as in the instant case, to protect the property right of the applicant to apply for time on the program of the broadcasting station at the usual time and at the customary rate.

18. Is the Federal Communication's Act of 1934, either by its present wording or by its omission to provide for religious broadcasting, unconstitutional in so far as it gives a licensee under the act the authority to determine arbitrarily what religious views may be broadcast over the radio station, subject only to the final authority of the Federal Communications Commission to grant or revoke a license, and thereby a violation of that portion of the first amendment which provides, 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof' ".

STATUTES AND REGULATIONS INVOLVED.

U.S.C. Title 15, Ch. 1, Section 13(a):

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent

competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them * * *"

U.S.C. Title 15, Ch. 1, Section 13(b):

"Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished * * *"

U.S.C. Title 15, Chapter 2, Section 44:

"'Antitrust Acts' means the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', approved July 2, 1890; also sections 73 to 77, inclusive, of an Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes', approved August 27, 1894; also the Act entitled 'An Act to amend sections 73 and 76 of the Act of August 27, 1894, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes" ', approved February 12, 1913; and also the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', Approved October 15, 1914. Sept. 26, 1914, c. 311, Sec. 4, 38 Stat. 719; Oct. 15, 1914, c. 323, Sec. 1, 38 Stat. 730; Mar. 21, 1938, c. 49, Sec. 2, 52 Stat. 111."

U.S.C. Title 47, Section 151:

"For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-Wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use

of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the 'Federal Communications Commission', which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter."

U.S.C. Title 47, Section 303 (f):

"Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter. * * *".

U.S.C. Title 47, Section 307 (a) and (d):

"(a) The Commission, if public convenience, interest or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefore a station license provided for by this chapter.

"(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications."

U.S.C. Title 47, Section 312 (a) and (b):

"(a) Any station license may be revoked for * * * failure to operate substantially as set forth in the license, or for violation of or failure to observe any of the restrictions and conditions of this chapter or of any regulation of the Commission authorized by this chapter."

"(b) Any station license after June 19, 1934 granted under the provisions of this chapter * * * may be modified by the Commission either for a limited time or for the duration of the term thereof if in the judgment of the Commission such action will promote the public interest, convenience and necessity, or the provisions of this chapter."

U.S.C. Title 47, Section 313:

"All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to * * * interstate or foreign radio communications. * * *"

U.S.C. Title 47, Section 326:

"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication * * *."

U.S.C. Title 47, Section 414:

"Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at Common law or by statute, but the provisions of this chapter are in addition to such remedies."

STATEMENT.

The defendant determines what programs shall be broadcast over its facilities and makes all the decisions in relation thereto. The programs consist of a continuous series of short features supplied either by the Station's own staff or by other parties who are commonly known as "advertiser."

Advertisers (or "Sponsors", as they are sometimes called) contract separately with the Station for the use of its facilities for specified time on specified days, and the charges (if any) for this privilege are agreed to in advance and specifically set forth in the contract. Payments made to the station by the "advertisers" constitute the station's principal source of income.

On February 20, 1945, the defendant had outstanding a number of contracts with "advertisers", including, inter alia, the plaintiffs in this case who were each sponsoring the broadcast of their respective religious services over the facilities of the defendant on a "commercial" or paid for basis. Each of the contracts included among its "Terms and Conditions" the following provision (wherein the word "Company" referred to the defendant and the word "sponsor" referred to the applicable plaintiff):

> "6. The Company shall have the right to terminate this contract upon giving two week's notice in writing, to the Sponsor, by registered mail, and at the expiration of the time mentioned in said notice this contract shall terminate as if the date set forth therein were the date provided in this contract for the termination thereof."

On the date above mentioned the defendant delivered or caused to be delivered to each of the plaintiffs a letter (substantially the same in each case) reading as follows:

"This is to advise you that Wm. Penn Broadcasting Company is adopting a new policy with respect to religious programs. Instead of time for religious broadcasts being sold on a commercial basis as has heretofore been done, we plan to inaugurate on a substantial basis, as a public service a series of religious broadcasts of general interest, the time for which will not be sold.

Your present commercial contract provides for termination upon two weeks' notice and such notice is hereby given.

We are however willing, if you desire and so advise us, to have the termination effective on April 2, 1945 by which date we wish to have our new policy in full operation.

This policy is in conformity with the general practice of principal radio stations throughout the country. We believe it will make for greater public service to the Philadelphia Community in the important matter of carrying religious worship into the home through radio broadcasting."

Each of the plaintiffs continued to broadcast through to April 2nd, 1945. Subsequent to April 2, 1945, the defendant has declined to permit the continuance of such broadcasts by any of the plaintiffs. Some of the plaintiffs had been operating over the station of the defendant under similar contracts for ten or more years continuously and one, Theodore Elsner, with some interruptions, for thirteen years. The defendant station, the signal letters of which were originally WRAX, was founded as a station largely for the broadcasting of religious services and programs and was originally owned and operated by the Berachah Church of Philadelphia, Pennsylvania. As a consequence defendant station has been consistently the largest seller of time for the broadcasting of religious services and programs in the City of Philadelphia. For a few years recently the

entire time of defendant station on Sundays from 7:30 A. M. until 11 P. M. has been taken up by the broadcasting of religious services and programs under paid contracts. Over a period of years a considerable portion of defendant's income from broadcasting was obtained from religious broadcasts, about 20% of defendant's income coming from that source. The average radio audiences of the plaintiffs consist of large numbers of people in Pennsylvania, New Jersey, New York, Delaware, Maryland, Rhode Island, Massachusetts and other states to whom plaintiffs and others have been bringing the Gospel of Jesus Christ practically ever since the station was established many years ago.

Since April 2, 1945, pursuant to the letter of February 20, 1945, hereinbefore set out, the defendant has given free time to certain religious organizations of its own choosing in the place and stead of religious broadcasts of the plaintiffs and others under paid contracts, and has refused to allow plaintiffs to bid and pay for the same or other time on its station although time is available. On February 20, 1945, the fact was, and defendant knew, that plaintiffs could not obtain any contract time on any other radio station in Philadelphia, and knew that its action would prevent plaintiffs from broadcasting and prevent their large radio audience from hearing, through them, the Gospel of Jesus Christ. The acts of defendant in terminating its contracts with the plaintiffs; in refusing plaintiffs the right to broadcast their services and in refusing plaintiffs the right to bid for time on a competitive basis were done with the intent to discriminate illegally against the plaintiffs. None of the plaintiffs were in default of payment at the time that they severally received the letter of February 20, 1945, and they state without denial that defendant's breach of each of the contracts was done maliciously with the intent to discriminate illegally against plaintiffs in particular and against the broadcasting of religious services in general, except those of defendant's own choosing. Each of the plaintiffs is engaged exclusively in religious work a large part of

which is done over the radio, and, having no adequate remedy at law, each is suffering irreparable damage by reason of defendant's willful, malicious and illegal acts hereinbefore referred to. The plaintiffs now being excluded from radio privileges have lost their radio audiences and such audiences are unable to receive the Gospel message which they had been receiving continuously heretofore from the plaintiffs, and certain religious and charitable organizations heretofore supported by contributions obtained by some of the plaintiffs from their audiences by solicitation on their broadcasting programs have been obliged either to discontinue or seriously to curtail their respective religious or charitable work.

SPECIFICATION OF ERRORS TO BE URGED.

1. The Circuit Court of Appeals erred in not holding that a radio broadcasting station is a facility employed in rendering quasi-public service such as water works, gas works, railroads, telephones and telegraphs, and is therefore a public utility.

2. The Circuit Court of Appeals erred in not holding that Congress under its constitutional power over interstate commerce has the power to extend existing legislation relating to radio broadcasting stations to the point of fixing and regulating the rates to be charged by a radio station as a public utility and in other respects which may be required by public interest, necessity or convenience.

3. The Circuit Court of Appeals erred in not holding that the fact that Congress has not as yet under its Constitutional power over interstate commerce extended existing legislation relating to radio broadcasting stations to the point of fixing and regulating the rates to be charged by a radio station as a public utility and making other changes

if any required by public interest necessity or convenience, does not change the fact that a radio station is a public utility and, as such, under the responsibilities and limitations to which public utilities as such are subject under the Constitution, statutes or by common law.

4. The Circuit Court of Appeals erred in not holding that the defendant radio broadcasting station does not possess the right to bar in advance and for all time any person, firm or corporation of proper character and qualifications, including these plaintiffs, from applying for an assignment of time on its station for a recognized and legitimate purpose to be used in compliance with the rules of the broadcasting station applicable to all advertisers and at the rates applicable to all advertisers.

5. The Circuit Court of Appeals erred in not holding that the right of any person, firm or corporation, including each of these plaintiffs, to apply for time on the spectrum of a radio broadcasting station for a radio broadcast to be conducted in accordance with the rules of the station appliable to all advertisers or sponsors and at rates paid by other advertisers and sponsors constitutes a property right.

6. The Circuit Court of Appeals erred in not holding that the defendant broadcasting station, where the choice between applicants lay between two equally qualified and competent applicants desiring to occupy the same time on the spectrum for legitimate purposes, had no power to reject the application of the applicant who offered to pay the usual charge of the station and make a gift of that time to an applicant who did not propose to and did not, pay the usual charge therefor.

7. The Circuit Court of Appeals erred in not holding that the defendant broadcasting station was estopped as to the plaintiffs herein each and every one of whom was ready and willing to pay the usual charges of the station; had

been an advertiser on the station for a number of years, paying for the service at the usual rates; and because the station itself was one established by a church primarily for the purpose of facilitating religious broadcasts, and refusing to permit plaintiffs or any of them to bid for time on the defendant station's program and assigning the time to other religious broadcasters who did not pay the usual rates but who received the time as a gift and to whom the time was given because they were each the personal choice of the defendant station.

8. The Circuit Court of Appeals erred in not holding that when defendant radio station barred the applicants here each of whom desired to contract for time for religious broadcasts at the usual rates of the defendant station and barred such applicants from applying for such time solely for the reason that such applicant offered to pay the usual and customary charges of the said station for such time, and gave the time free to other persons of its own choosing to be used by them for religious broadcasts, that such an act is a violation of the free exercise of religion secured by the First Amendment to the Constitution.

9. The Circuit Court of Appeals erred in not holding that the acts, or some of them, set out and described in Specification of Errors Nos. 4, 6 and 8 are, as to at least some of such acts so committed, illegal because done in violation of the antitrust laws or the common law.

10. The Circuit Court of Appeals erred in holding that the amended bill of complaint herein does not set out or contain any cause of action in favor of the plaintiffs or any of them against the defendant.

11. The Circuit Court of Appeals erred in holding "The authority of the Commission as defined in Section 303, 47 U.S.C.A. 303 includes the power to pass upon

such allegations of unfair treatment as the plaintiffs make here respecting the defendant."

12. The Circuit Court of Appeals erred if by the language "The Commission may refuse to renew defendant's license if it has failed to act in the public interest" it intended, as it apparently did, to hold that such a failure would be an exercise of "the power to pass upon such allegations of unfair treatment as the plaintiffs make here respecting the defendant."

13. The Circuit Court of Appeals erred if it meant by the language "in any event enforcement of the act rests in the Federal Communications Commission and not in the District Courts of the United States save for a right of review of the Commission's orders afforded under Section 402 (a)" that an advertiser, sponsor or contractor with a radio broadcasting station such as defendant cannot under any circumstances maintain a suit in equity for the protection of its rights.

14. The Circuit Court of Appeals erred if by the following language in the opinion "The First Amendment was intended to operate as a limitation to the actions of Congress and of the Federal Government" it meant that where a radio broadcaster commits an act which excludes all applicants for religious broadcasts who desire time on that station to be paid for at the station's usual rates and permits the station to confine religious broadcasts to those whom it picks out to receive as a gift free time for religious broadcasts over its station, and a District Court upholds this action and thus puts an interpretation on that portion of the Federal Communications Commission act which through such a construction makes an act performed by a radio broadcasting station an unconstitutional interference with the free exercise of religion, that this act on the part of such a radio broadcasting station, approved by a District Court, can not be reviewed

either in a Circuit Court of Appeals or in this court, as the case may be.

15. The Circuit Court of Appeals erred in not holding that a suit in equity by an applicant in the case of a refusal of his right even to make application for a license, as in the instant case, is necessary and proper procedure to protect the property right of the applicant to apply for time on the program of the broadcasting station at the customary rate.

16. The Circuit Court of Appeals erred in affirming the decision of the District Court of the United States for the Eastern District of Pennsylvania herein.

17. The Circuit Court of Appeals erred in not deciding that the Federal Communications Act of 1934 was either by its present wording or by its omission to provide for religious broadcasting, unconstitutional in so far as it gives a licensee under the act the authority to determine arbitrarily even indirectly what religious views may be broadcast over the radio station, subject only to the final authority of the Federal Communications Commission to grant or revoke a license, and thereby occurs a violation of that portion of the first amendment which provides, "Congress shall make no law respecting an establishment of religion or prohibting the free exercise thereof."

REASONS FOR GRANTING THE WRITS.

The Federal Communications Act is a comparatively new Statute. There have been very few decisions by this court on it. This is the first time that a question involving the rights of an advertiser or sponsor (the terms are used interchangeably in the decisions) has been presented to this court for review. One of the two reasons for granting writ

of certiorari stated by Chief Justice Taft in *Magnum Co. vs. Coty*, 262 U. S. 159, 163 is:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeal was given for two purposes. To bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort."

ARGUMENT.

There is no necessity for an extended argument. The eighteen questions and their complementary seventeen Specifications of Error are arguments in themselves and in the opinion of the petitioners' attorneys sufficient to bring the questions involved for the consideration of the court. However, it is thought it might be helpful to pair the questions and the errors and make brief notations as to some authorities which will be cited. In addition to those authorities, F.C.C. v. Pottsville Broadcasting Co., 309 U. S. 134; F.C.C. v. Sanders Bros., 309 U. S. 470, 474; Radio Station WOW Inc. v. Johnson, S. Ct. June 18, 1945 (not yet reported); National Broadcasting Co. v. U. S., 319 U. S. 190; and Scripps Howard Radio Co. v. F.C.C., 316 U. S. 4, will each, it is contemplated, be cited in support of more than one argument advanced by the petitioners.

Questions 1, 2 and 3, Errors 1, 2 and 3: Numerous authorities, possibly none exactly in point; none opposing position of petitioners. See cases cited under Questions 10, 11, 12, Errors 9, 10 and 16.

Question 4, Error 4; new question; no direct authority, but see authorities cited below under Questions 10, 11, 12, Errors 9, 10 and 16.

Question 5, Error 5:

> "Property is 'nomen generalissimum' and extends to every species of valuable rights and interests, and

includes real and personal property, easements, franchises, and incorporeal hereditaments." (Boston R. R. Co. vs. Salem, 68 Mass. 1, page 35.) See also 4 Pet., 511; U. S. v. Willow River Power Co., 65 S. Ct. 761, 764.

Question 6, Error 6; American Express Co. v. U. S., 212 U. S. 522, 529; Louisville & Natl. R. R. Co. v. U. S., 282 U. S. 740.

Questions 7 and 8, Error 7; Van Renssalaer v. Kearney, 52 U. S. 297, 326 and subsequent decisions.

Question 9, Error 8; Murdock v. Commonwealth of Pennsylvania, 319 U. S. 105, 115, and other cases.

Questions 10, 11 and 12, Errors 9, 10 and 16; New question.

Analogous authorities, none contrary to petitioners' view. (See Cornellius Moore, 267 Fed. 468; Coty v. Pristonets, 285 Fed. 501, 514, 515; In re Debs 158 U. S. 564, 593; Everett v. Williams, 9 L. Q. B. 197; Ex Parte Young, 209 U. S. 123; International Railway Co. vs. Schwab et al., 129 Misc. Rep. 428 (New York); Latham v. Northern Pacific, 45 Fed. 721; Maple Flooring Assoc. v. U. S., 268 U. S. 563; National Mercantile Ltd. v. Keating, 218 Fed. 477; New Hampshire Gas v. Norse, 42 Fed. 2d 490, 493, 494; Philadelphia Co. v. Stimson, 223 U. S. 605-620; Robinson vs. Commissioner, 100 F. 2d 847; Western Union v. Andrews, 216 U. S. 165.)

Questions 13 and 14; Errors 11 and 12; the error here is plain.

Section 303 of the Federal Communications Act (47 U.S.C. 303) does not contain any such authority as the opinion states that it does, and obviously, the fact that "The Commission may refuse to renew the defendant's license if it has failed to act in the public interest" is not an exercise of "the power to pass upon such Allegations of unfair treatment as the plaintiffs make here respecting the defendant". It has no application to the private wrong

done to an advertiser or prospective advertiser by the owner of a broadcasting station.

Question 15, Error 13: Virginia Railway Co. v. System Federation No. 40, 300 U. S. 515; Scripps-Howard Radio Co. vs. FCC, 316 U. S. 4, 14. Radio Station WOW Inc. v. Johnson, S. Ct. June 15, 1945 (not yet reported).

Question 16, Error 14; Virginia Railway Co. v. System Federation No. 40, 300 U. S. 515, Scripps-Howard Radio Co. v. FCC, 316 U. S. 4, 14; see also cases cited under Q, 10, 11, 12, Errors 9, 10 and 16.

Question 17, Error 15: Virginia Railway Co. v. System Federation No. 40, 300 U. S. 515; Scripps-Howard Radio Co. v. F.C.C., 316 U. S. 4, 14, National Broadcasting Co. v. United States, 319 U. S. 190, 223.

Question 18, Error 17; Murdock v. Commonwealth of Pennsylvania, 319 U. S. 105, 115 and other cases.

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 722. OCTOBER TERM, 1945.

CARL McINTIRE; YOUNG PEOPLE'S CHURCH OF THE AIR, INC., a corporation; WORD OF LIFE FELLOWSHIP, INC., a corporation; THEODORE ELSNER, E. SCHUYLER ENGLISH; HIGHWAY MISSION TABERNACLE, a corporation; WILEY MISSION, INC., a corporation; and WESLEYAN METHODIST CHURCH, a corporation, Petitioners,

v.

WM. PENN BROADCASTING COMPANY of Philadelphia, owner and operator of Radio Broadcasting Station "WPEN", Respondent.

BRIEF FOR RESPONDENT, WM. PENN BROADCASTING COMPANY OF PHILADELPHIA, OWNER AND OPERATOR OF RADIO BROADCASTING STATION "WPEN", IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945. No. 722.

Carl McIntire; Young People's Church of the Air, Inc., a corporation; Word of Life Fellowship, Inc., a corporation; Theodore Elsner, E. Schuyler English, Highway Mission Tabernacle, a corporation; Wiley Mission, Inc., a corporation; and Wesleyan Methodist Church, a corporation,

Petitioners,

v.

Wm. Penn Broadcasting Company of Philadelphia, owner and operator of Radio Broadcasting Station "WPEN",

Respondent.

BRIEF FOR RESPONDENT, WM. PENN BROADCASTING COMPANY OF PHILADELPHIA, OWNER AND OPERATOR OF RADIO BROADCASTING STATION "WPEN", IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

STATEMENT.

The Respondent in this Court and the Defendant in the District Court, Wm. Penn Broadcasting Company, a Delaware corporation (hereinafter called "WPEN" or "the Station"), is the owner of a radio broadcasting station in the City of Philadelphia, Pennsylvania, which it has been operating for a number of years with prescribed power (5 kilowatts) and upon a prescribed frequency (950 kilocycle "wave-length") under a series of short-term licenses issued by the Federal Communications Commission pursuant to the provisions of the Communications Act of 1934 (29a).

The present license of the station provides, *inter alia*, as follows (32a):

> "The licensee shall, during the term of this license, render such broadcasting service as will serve public interest, convenience, or necessity to the full extent of the privileges herein conferred.
>
> "This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequency designated in the license beyond the term hereof, nor in any other manner than authorized herein. Neither the license nor the right granted hereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934".

Like other radio broadcasting stations similarly operated throughout the United States, WPEN has the right and duty of determining what programs shall be broadcast over its facilities and is obliged to reserve to itself the final decision as to what programs will best serve the public interest.* The said programs consist of a continuous series of short features supplied either by the

* See *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 205 (1943). And see also the language used in the letter from the Federal Communications Commission (Record, p. 19a).

Station's own staff or by other parties who are commonly known as "advertisers" (36a). Advertisers (or "Sponsors", as they are sometimes called) contract separately with the Station for the use of its facilities for specified time on specified days, and the charges (if any) for this privilege are agreed to in advance and specifically set forth in the contract. Payments made to the Station by the "advertisers" constitute the Station's principal source of income (21a). Inasmuch as the "advertiser" supplies his own feature, choice by the Station of its programs necessarily involves a selection and choosing by the Station of the "advertisers" with whom it is willing to contract.

On February 20, 1945, in the course of conducting its business as above described, WPEN had outstanding a number of contracts with "advertisers", including, *inter alia,* the eight Plaintiffs in this case (Petitioners in this Court) who were each "sponsoring" the broadcast of their respective religious services over the facilities of WPEN on a "commercial" or paid-for basis. Listed in the chronological order of their expiration dates, those contracts were as follows:

*Specified Expiration Date**	*Name of Plaintiff*	*Date of Contract*	*Page of Printed Record*
April 1, 1945	Young Peoples Church of the Air, Inc.....	May 3, 1944	42a
May 26, 1945	E. Schuyler English (The Pilgrims)	May 2, 1944	50a
May 27, 1945	Carl McIntire.....	May 18, 1944	36a
June 17, 1945	Wesleyan Methodist Church	May 8, 1944	54a
June 23, 1945	Word of Life Fellowship, Inc.	May 8, 1944	45a
June 30, 1945	Wiley Mission, Inc.....	June 12, 1944	56a
July 22, 1945	Wiley Mission, Inc.....	June 12, 1944	58a
Sept. 23 1945	Highway Mission Tabernacle	Aug. 28, 1944	52a
Nov. 11, 1945	Theodore Elsner (Phila. Gospel Tabernacle).....	Oct. 28, 1944	47a

* By "specified expiration date" is here meant the date upon which the contract normally would expire in the absence of earlier termination by cancellation pursuant to its terms.

Each of the contracts above mentioned included among its "Terms and Conditions" the following provision (wherein the word "Company" referred to WPEN and the word "Sponsor" referred to the applicable Plaintiff), viz. (40a, 43a, 46a, 48a, 51a, 53a, 55a, 57a and 59a):

> "6. The Company shall have the right to terminate this contract upon giving two week's notice in writing, to the Sponsor, by registered mail, and at the expiration of the time mentioned in said notice this contract shall terminate as if the date set forth therein were the date provided in this contract for the termination thereof."

On the date above mentioned, to wit, February 20, 1945, acting pursuant to the options reserved to it under the said contracts, WPEN duly served upon each of the Plaintiffs in this case (28a) a written notice of its election to terminate the contract prior to its expiration date, and although the date so accelerated would in all cases have fallen on a day prior to Easter Sunday, April 1, 1945, Defendant offered in said notice to permit each Plaintiff to continue its broadcasting schedules to and including April 1, 1945.

Although the notices of termination addressed to the Plaintiffs were not in each case identical, they were all substantially similar, and the following, which is a copy of the notice sent by WPEN to Plaintiff, Rev. Carl McIntire, is completely representative of all the others (17a, 41a, 44a, 46a, 49a, 52a, 54a, 56a, 59a).

> "This is to advise you that the Wm. Penn Broadcasting Company is adopting a new policy with respect to religious programs. Instead of time for religious broadcasts being sold on a commercial basis as has heretofore been done, we plan to inaugurate on a substantial basis, as a public service a series of religious broadcasts of general interest, the time for which will not be sold.

*"Your present commercial contract provides for termination upon two weeks' notice and such notice is hereby given.** We are however willing, if you desire and so advise us, to have the termination effective on April 2, 1945, by which date we wish to have our new policy in full operation.

"This policy is in conformity with the general practice of principal radio stations throughout the country. We believe it will make for greater public service to the Philadelphia community in the important matter of carrying religious worship into the home through radio broadcasting."

All of the Plaintiffs continued to broadcast their programs over WPEN's station through Easter Sunday, *i. e.*, April 1, 1945 (28a); and subsequent to that day Defendant has declined to permit the continuance of such broadcasts. All of the contracts have now expired by their own terms, although at the time of the argument in the Court below on July 26, 1945, two of the Plaintiffs (Appellants in the Circuit Court) had contracts as to which the original "expiration date" had not then arrived, namely, Highway Mission Tabernacle, with an original term ending on September 23, 1945 (52a), and Theodore Elsner (operating as the Philadelphia Gospel Tabernacle), with an original term ending on November 11, 1945 (47a).

Certain of the Plaintiffs in this suit after beginning this litigation petitioned the Federal Communications Commission, complaining that WPEN had acted illegally in cancelling their contracts. The Commission, on April 24, 1945 (Mimeograph No. 81,846 dated April 24, 1945), denied the petition, stating in part:

"The policy of Congress as expressed in the Communications Act of 1934 contemplates that the selection and presentation of radio programs shall

* Emphasis supplied.

be vested in the individual station licensee. * * * The Commission has carefully considered the matters alleged in your complaint and the representations made to it by the licensee of Station WPEN to determine whether there has been a violation of the licensee's obligation to operate in the public interest. The Commission is of the opinion that the representations of Station WPEN are consonant with the licensee's obligation to present a diversified and well-rounded program service. For the foregoing reasons, the Commission has today denied your petition."

A subsequent petition for reconsideration and rehearing was denied on June 26, 1945 (Broadcast Actions by the Federal Communications Commission, Mimeograph No. 83,092; Report No. 688).

The present action was commenced on April 6, 1945, by the filing of a Bill in Equity, which was followed by a motion for the issuance of a temporary restraining order, which the District Court denied on April 10, 1945 (20a).

On April 12, 1945, Plaintiffs deserted the "common carrier" theory, upon which they theretofore relied, and filed an amended Bill. On April 16, 1945, a Stipulation of Counsel (27a) was filed, by which copies of all the contracts involved and a copy of the Defendant's radio broadcasting station license issued by the Federal Communications Commission were made a part of the Amended Bill, together with the fact that the Plaintiffs had been permitted by Defendant to continue their broadcasting programs through Easter Sunday, April 1, 1945.

Thereafter, on April 18, 1945, upon Defendant's written Motion (60a) to dismiss the Bill in its amended form, the District Court entered its final decree (62a) granting such Motion.

The proceedings in the District Court were all before District Judge William H. Kirkpatrick.

Immediately following the entry of the final decree, the Petitioners (Plaintiffs in the District Court) appealed

(63a) to the Circuit Court of Appeals for the Third Circuit, wherein argument was had before Circuit Judges John Biggs, Jr., and Curtis L. Waller and Gerald McLaughlin on July 26, 1945 (73a).

On October 12, 1945, the Circuit Court affirmed the judgment of the District Court with an opinion (74a) by Judge Biggs which concluded with the following paragraph:

> "The court below dismissed the amended complaint upon the motion of the defendant on the ground that it stated no cause of action against the defendant. It committed no error in doing so" (81a).

ARGUMENT.

1. The Federal Communications Commission, having jurisdiction over the performance of the Respondent in the public interest, has properly denied the relief sought.

In their Bill filed in the District Court, the Petitioners alleged that the acts of the Respondent were illegal under the Communications Act of 1934 as in violation of the public interest. This complaint was twice presented to the Federal Communications Commission in the form of petitions for relief. The Commission denied both petitions, and Petitioners failed to avail themselves of their opportunity for judicial review as provided in Section 402(a) of the Communications Act of 1934, as amended.

In view of the foregoing, it is submitted that the Court below properly held as follows:

> "The authority of the Commission as defined in Section 303, 47 U. S. C. A. § 303 includes the power to pass upon such allegations of unfair treatment as the

plaintiffs make here respecting the defendant. The Commission may refuse to renew the defendant's license if it has failed to act in the public interest. Indeed certain of the plaintiffs have complained to the Commission of the defendant's actions which are the basis for the suit at bar, but the Commission was of the opinion that the defendant's action in cancelling the contracts was not against the public interest. In the case at bar, however, we are concerned only with the question of whether the plaintiffs have stated any cause of action against the defendant cognizable in a district court of the United States. We are of the opinion that they have not done so for the reasons stated immediately hereinafter" (77a).

* * * * * * *

"An appeal lay from the order of the Commission under Section 402(a) of the Federal Communications Act, 47 U. S. C. A. § 402(a). See the Urgent Deficiencies Act, 28 U. S. C. A. § 47. None of the plaintiffs availed themselves of the right of review thus afforded" (78a).

Insofar as the Petitioners seek a determination of whether the acts of the Respondent were in the public interest; the Court below properly found that Petitioners were in effect asking a court of equity to supplant its judgment for that of the Federal Communications Commission by means of the harsh and peculiarly inappropriate instrumentality of injunction, with respect to a question which is exclusively within the jurisdiction of the Commission, and with reference to which the statute has provided specific procedure for judicial review not availed of by the Petitioners.

Clearly, the Court below correctly affirmed the District Court in holding that no reason had been shown for judicial interference.

2. The Supreme Court of the United States has already passed upon the questions alleged to be novel.

The Petitioners assert as a principal "reason for granting the writ" that "* * * This is the first time that a question involving the rights of an advertiser or sponsor (the terms are used interchangeably in the decisions) has been presented to this court for review." Importance may be attached to the fact that Petitioners do not allege either (1) that the principles involved have not before been passed upon by the Supreme Court of the United States or (2) that there is conflict with respect to such principles in the judgments which have been handed down by the Courts of the several Circuits. It is submitted that the Petitioners did not so allege because the principles have been decided by this Court; that such principles were followed by the Court below; and that there is no conflict among the Circuits.

The incidental fact that the particular Petitioners happen to be advertisers or sponsors can, of itself, form no proper foundation for the granting of the Writ.

The issues sought to be raised in the District Court, in the Circuit Court, and now in this Court are based upon the Petitioners' allegations that: (1) The Respondent's business is a "public utility"; (2) The Respondent's refusal to do business on Petitioners' terms is in violation of the anti-trust laws and the Communications Act of 1934; (3) The Petitioners have acquired a property right to broadcast over the Respondent's station by reason of some undefined "prescription" or "estoppel"; and (4) The Respondent's refusal to the Petitioners of broadcasting time upon their own terms has denied the Petitioners free speech and freedom of religion over the radio.

That Respondent is not a "public utility" in the absence of a dedication of its business to the purpose of serving advertisers, or legislation preventing it from

selecting its own customers, is clear from the decision of this Court in *Federal Trade Commission* v. *Raymond Bros.-Clark Co.*, 263 U. S. 565, 573 (1924). The Supreme Court of Pennsylvania has explicitly stated that a radio broadcasting station is not a public utility and may choose between applicants for its facilities. *Summit Hotel Co.* v. *National Broadcasting Co.*, 336 Pa. 182, 197 (1939).

The difference between the duties and the responsibilities of a radio station carrying a Federal license and those of a "public utility" or common carrier are clearly apparent from a reading of *National Broadcasting Co.* v. *United States*, 319 U. S. 190 (1943), and *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470 (1940). Those cases show that the radio station not only has a right, but a clear duty, to determine what programs shall be broadcast over its facilities, and to reserve to itself the final decision as to what programs will best serve the public interest; further, that a radio station is in violation of the provisions of the Communications Act of 1934 if it agrees to accept programs on any basis other than its own responsibility and reasonable decision that a program is in the "interest of the listening public."

Clearly, the Petitioners' contention that, in addition to the interest of the listening public, there is an obligation (like that of a public utility) to sell time without respect to program content, which controls the decision of the Respondent in the selection of programs to broadcast, has already been settled against the Petitioners.

That there is no basis for Petitioners' claim that Respondent has violated the anti-trust laws appears from the most cursory examination of the facts and the pleadings, which are wholly void of any suggestion of the usual allegations which must form the basis of any such complaint. This contention is completely and effectually disposed of by the Circuit Court's comment with respect to the failure of Petitioners to set forth in the amended com-

plaint allegations sufficient "to state any cause of action under the anti-trust laws." The Court stated:

> "For example, it is not alleged that the defendant is in a dominant position in the broadcasting field or that it is a member of a chain which so monopolizes radio broadcasting as to render it impossible for the plaintiffs to find other outlets for their broadcasts. Neither conspiracy nor concert of action is asserted. As we stated in Goldman Theatres, Inc. *v.* Loew's Inc., F. 2d , , paraphrasing a statement in United States *v.* Socony-Vacuum Oil Co. (C. C. A. 7), 105 F. 2d 809, 825, 'The purpose of the anti-trust laws—an intendment to secure equality of opportunity—is thwarted if group power is utilized to eliminate a competitor who is equipped to compete.' The plaintiffs do not allege that the defendant seeks to eliminate a competitor by refusing to sell radio time to the plaintiffs. It is not asserted that the defendant entered into a conspiracy with the plaintiffs' competitors in religious broadcasting to eliminate the plaintiffs from the religious broadcasting field. Indeed, in justice to the plaintiffs it should be stated that they do not assert expressly that they are competitors in a field of religious broadcasting or that religious broadcasting is a commodity. Properly they have avoided such allegations but the plaintiffs have stated no cause of action under the anti-trust laws of the United States.
>
> "These allegations may conceivably be construed as relating to some vague charge of unfair competition. But the plaintiffs do not assert that they are selling a commodity. The allegations seem to charge an 'illegal discrimination' in that the defendant insists on preferring other religious broadcasters to the plaintiffs. But there is no reason, the FCC permitting and no violation of the anti-trust laws being involved,

why the defendant may not sell time to whomever it pleases. As we have stated, Congress has confided the selection of program material to be broadcast to the taste and discrimination of the broadcasting stations" (78a-79a).

That Petitioners have no "property right" to broadcast over any radio station is clear from an elementary understanding of the art and the law relating thereto.

That the Petitioners have not been denied their constitutional guarantee of freedom of speech and freedom of worship is clear. As the Court below stated:

"True, if a man is to speak or preach he must have some place from which to do it. This does not mean, however, that he may seize a particular radio station for his forum. See the apt language of Mr. Justice Frankfurter in National Broadcasting Co. *v.* United States, *supra,* at p. , 'Unlike other modes of expression radio inherently is not available to all.'

"Assuming *arguendo* that the defendant's cancellations of the plaintiffs' contracts have limited plaintiffs' opportunities to speak or preach freely, the First Amendment was intended to operate as a limitation to the actions of Congress and of the federal government. The defendant is not an instrumentality of the federal government but a privately owned corporation. The plaintiffs seek to endow WPEN with the quality of an agency of the federal government and endeavor to employ a kind of 'trustee-of-public-interest' doctrine to that end. But Congress has not made WPEN an agency of government. For this court to adopt the view that it has such a status would be judicial legislation of the most obvious kind.

"Finally, on this particular aspect of the case at bar, we state that we know of no federal statute which gives a cause of action against a private person who has abridged another's right to freedom of speech

or to the free exercise of religion. *Cf.* Screws *v.* United States, U. S. , and Picking *v.* Penna. R. Co. (C. C. A. 3), F. 2d .

"The assertion that the actions of the defendant constitute censorship has in essence been discussed in the foregoing paragraphs. For a radio station to refuse to sell time in which an individual may broadcast his views may be censorship but we know of no law which prohibits such a course. As we have indicated a radio broadcasting station is not a public utility in the sense that it must permit broadcasting by whoever comes to its microphones. *Cf.* Pulitzer Publishing Co. *v.* Federal Communications Commission (C. A. D. C.) 94 F. 2d 249" (79a-80a).

Clearly, the issues attempted to be raised by the Petition, therein alleged to be novel, involve principles which have been well settled by this Court. There is no foundation to the allegation that the Petition presents for "the first time" a new question for the consideration of this Court. As the Court below determined, the Petitioners have failed to set forth any question which warrants judicial intervention.

3. Petitioners' contracts have all expired by their own terms, and the alleged issues relating thereto have become moot.

As hase been set forth in the Statement at the beginning of this brief, *all* of the contracts of *all* of the Petitioners (Plaintiffs in the District Court) have expired by their own terms, the last having expired on November 11, 1945.

Even if it were to be assumed that the Petitioners may have had some right at the time when they filed their Bill in the District Court, it is clear beyond any question that such rights have now expired and that questions relating thereto have become moot.

Certainly, the Petitioners have shown no proper reason for the granting of the Writ prayed for in this case, where Petitioners' rights, in accordance with the provisions of the agreements upon which they base their case, have come to an end.

It is submitted that for the reasons stated in the opinion of the Circuit Court, the Amended Bill of Complaint was properly dismissed on the ground that it stated no cause of action against the Defendant, and that for the reasons herein stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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vs.

WM. PENN BROADCASTING COMPANY OF PHILADELPHIA, owners and operators of Radio Broadcasting Station "WPEN".

PETITIONERS' REPLY BRIEF

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vs.

WM. PENN BROADCASTING COMPANY OF PHILADELPHIA, owners and operators of Radio Broadcasting Station "WPEN".

PETITIONERS' REPLY BRIEF

The respondent's first point of argument is based upon that portion of the opinion of the court below which indicates that petitioners were relegated to an appeal from an order of the Commission under Section 402 (a) of the Federal Communications Act, 47 U. S. C., Section 402 (a). That argument is untenable for three reasons:

(a): Section 402(a) permits the institution of an action in a Federal District Court to set aside, annul or suspend an order of the Commission. In the case at bar the negative action taken by the Commission, to wit the denial of the petition for relief, is obviously not such an order as contemplated by Section 402 (a). The setting aside, annulling or suspend-

ing of the Commission's action would not afford the petitioners the relief requested in this suit and to which they are entitled. The Federal Communications statute does not confer any jurisdiction upon the Federal Communications Commission to give relief to advertisers (sponsers) whose rights have been infringed or invaded by a broadcasting corporation.

(b): The action of the Federal Communications Commission (Respondent's Brief, p. 5) is not based on anything contained in the transcript of record. There is nothing to indicate who complained to the Commission, what they complained about or the ground for the complaint. Whatever it was it was not before the District Court of the United States for the Eastern District of Pennsylvania which entered its final decree on April 19, 1945 (62-a). The decision of the Federal Communications Commission was made April 24, 1945 (Respondent's Brief, p. 5)—six days after the District Court judgment was entered.

(c): A proceeding in the nature of a complaint before the Federal Communications Commission is no bar to a suit in the United States courts. Section 414 of the Communications Act of 1934, 47 U. S. C., Section 414 provides:

> "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

Point 2 of respondent's argument cites *Federal Trade Commission* v. *Raymond Bros.-Clark Co.*, 263 U. S. 565, 573. That case involved a wholesale dealer in and a manufacturer of groceries. While it is true that a private trader of ordinary commercial articles may exercise his independent discretion in the selection of those with whom he will deal,

the respondent here is not such a private trader—its activities and practices are limited and regulated by statute and by regulations of the F. C. C. It is the contention of the petitioners here that the respondent and all other similar broadcasting stations are public utilities already limited to a certain extent by statute and which may be further regulated by additional statutes. The respondent cites the case of *Summit Hotel Co.* v. *National Broadcasting Co.*, 336 Pa. 182, 197, for the principle that "the Supreme Court of Pennsylvania has explicitly stated that a radio broadcasting station is not a public utility" (Respondent's Brief, p. 10). That point was mentioned briefly in a rather long opinion and was not necessary to the decision. All that the court said there (p. 197) was "radio companies are not in that category (telephone and telegraph companies). They may select their performers and choose between applicants for the use of their facilities." The quoted language from the opinion cited does not sustain the statement of the brief. It is interesting to note that the authority cited in the opinion for the two-sentence statement is the case of *Sta-Shine Products Co. Inc.* v. *Station WGBB*, 188 I. C. C. 271, which case was decided before the enactment of the Communications Act of 1934 and construed the 1927 act.

Furthermore, it is not necessary in the Federal Courts to state a "cause of action". It is required only that the complaint state facts showing that the pleader is entitled to relief. The complaint here contains the necessary allegations, to wit (Record, pp. 22a-25a): That the petitioners have acquired property rights which respondent is seeking to destroy (Par. 6); that the respondent is barring the petitioners, forever, from competing for time on its program so long as they offer to pay for the time at the regular rates, even when time is available, but is giving time for similar religious broadcasts to applicants of its own choosing who pay nothing (Pars. 7 and 9 and Exh. A, p. 17a);

the respondent's refusal to permit the petitioners to broadcast (Par. 8); the respondent's refusal to allow the petitioners to bid for time and to pay for it (Par. 9); respondent's knowledge that petitioners could not obtain facilities on any other radio station and that the action it took would prevent the petitioners from broadcasting and prevent their large radio audience from hearing through them the gospel of Jesus Christ (Par. 10); that respondent was committing acts with the intent to discriminate illegally against petitioners (Par. 11); that respondent's breach of its contract with the petitioners was done maliciously and with the intent to discriminate illegally against the petitioners in particular and against the broadcasting of religious services in general except those of its own choosing (Par. 15); that the acts of respondent are in violation of the petitioners' constitutional rights of free speech and free exercise of religion; that petitioners are now being excluded from the air and as a result will lose their audiences and their audiences will be unable to receive the gospel message which they had been receiving continuously heretofore and that religious and charitable organizations and work heretofore supported by contributions will have to be discontinued or seriously curtailed (Par. 16).

Respectfully submitted,

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